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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of  
Public Interest Obligations  
Of Television Broadcast Licensees

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MM Docket No. 00-167

Comments of

**CHILDREN NOW**

1212 Broadway, Fifth Floor  
Oakland, CA 94612  
(510) 763-2444  
[www.childrennow.org](http://www.childrennow.org)

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## Summary of Comments

Children Now, in association with the national coalition People for Better TV, hereby summarizes its comments for the Commission's convenience. The instant summary both highlights core components of Children Now's proposal, and indicates to which paragraphs of the *NPRM* each component responds. Children Now notes that, in addition to outlining specific proposals, our comments articulate a core philosophy underlying those proposals. That philosophy consists of the conviction that digital television's full potential to enhance educational and informational programming can be realized only through cooperation between the public and private sectors. Thus, we seek in our proposals to strike a careful balance between ensuring protections for children through regulation, while providing broadcasters the flexibility to produce innovative programming, and ideally to recognize a nexus between their own interests and those of child viewers. A summary of our comments' primary components follows:

- **PROPORTIONAL BROADCAST PROGRAMMING RULE:**  
Children Now proposes that the existing regulatory requirement that broadcasters program a minimum of three hours per week of educational and informational programming, or "core" programming, be translated into a requirement that 3% of each broadcaster's programming be core in the digital age. Percentage-wise, this is equivalent to the existing three hour requirement, as three hours out of a current 105 hour programming week<sup>1</sup> amounts to roughly 3%. The proportional rule offers an unambiguous minimum programming guarantee, at the same time as it provides broadcasters tremendous flexibility insofar as it speaks only to *quantification*, while leaving broadcasters free to determine how to offer the required core programming. A broadcaster would be free, for example, to fill the required core programming amount by dispersing core programming across its channels, or alternatively, by creating a specialized children's programming channel. Children Now proposes that the amount of "overall programming" from which to calculate the amount of core programming to be aired include both fee and pay programming. *Children Now discusses this proposal in section II(B) of its comments, and in that section responds to questions raised by the Commission in ¶¶ 15 – 17, 19 and 21-23 of the NPRM.*
- **PROPORTIONAL INTERACTIVITY RULE:**  
Children Now proposes that the same percentage of core programming include an interactive component as does non-core programming. That is, for all non-core programming that regularly features an interactive component, the same percentage of non-core programming should also feature such components. Broadcasters would be required to explain, in

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<sup>1</sup> The "105 hour programming week" is derived by multiplying the daily fifteen hour programming window during which core programming may be broadcast (from 7 a.m. to 10 p.m.) by the seven days in a week. Thus, over the course of a week, there are 105 total hours during which the three hour core programming requirement may be filled.

the same Commission reports in which they explain why their core programming qualifies as “educational and informational,” why any interactive components used to satisfy the interactivity requirement themselves are “educational and informational.” This rule is a mere extension of the existing core programming rule, requiring broadcasters to share the advanced capacity of their new digital spectrum in the same way that they are required to share their broadcast programming capacity by airing core programming. Furthermore, Children Now urges that broadcasters be encouraged to incorporate educational interactive features into their *non-core* programming.

*Children Now discusses this proposal in section II(C) of its comments, and in that section responds to questions raised by the Commission in ¶¶ 15, 18-19, and 24 of the NPRM.*

- **INCREASED ACCESS TO INFORMATION BY PARENTS:**  
Children Now proposes that an unobtrusive informational link (likely similar in appearance to existing station identification symbols utilized by broadcasters) be available throughout core programming, and that the link, when engaged, provide the following information: the fact that the program is considered core, an explanation of what core programming is, the age range toward which the program is geared, and a synopsis of the explanation provided by the broadcaster to the Commission as to how the program is educational and informational. This proposal is based largely upon the input of numerous experts on children and the media who explained that parents, at the present time, generally lack meaningful information as to the existence of a core programming requirement, let alone what is meant by “core” programming, or what programs are “core” and why. Such experts opined that increased information to parents thus is crucial to effectuate any core programming requirement, and further that such increased information could serve as a powerful marketing tool for broadcasters who program quality core programming.  
*Children Now discusses this proposal in section II(D) of its comments, and in that section responds to questions raised by the Commission in ¶¶ 34 and 38 of the NPRM.*

- **“PAY OR PLAY”: A MODEL FOR FUTURE CONSIDERATION:**  
Children Now determines that any final rule on the issue of “pay or play” should be deferred until a later date. This determination is based upon the conclusion that too little is known at the present time about the potential structure of the broadcasting market, market incentives, and the relative positions of the market’s players in the digital age. Thus, Children Now suggests that the Commission open an inquiry into “pay or play” within a year or two after the digital era has more fully unfolded, and the realities of the marketplace therefore are better known. At the same time, Children Now attaches as an appendix a detailed analysis of *potential* “pay or play” models, and in particular of a private contract approach to “pay or play”

which Children Now believes holds particular promise. Children Now urges that this analysis be utilized as a focal point for future inquiry. *Children Now discusses “pay or play” in section II(D) of its comments and in attached Appendix A, and in those discussions responds to questions raised by the Commission in ¶ 20 of the NPRM.*

- **PROPORTIONAL PROMOTIONAL REQUIREMENT:**

Children Now proposes that broadcasters dedicate 3% of all time that they spend promoting their own programming either to the promotion of core programming or to public service announcements discussing the value of educational and informational programming generally. As with enhanced access to information by parents as to core programming, Children Now believes that a minimum promotional requirement is necessary to make the core programming requirement effective. Furthermore, Children Now’s proposal is quite reasonable both insofar as it mandates promotions only to the same degree that core programming generally is mandated, and also in that it gives broadcasters the flexibility to choose between promoting specific programs directly, or airing related public service announcements.

*Children Now discusses this proposal in section II(E) of its comments, and in that section responds to questions raised by the Commission in ¶¶ 34 and 38 of the NPRM.*

- **PREEMPTION OF CORE PROGRAMMING:**

Children Now proposes that broadcasters be required, rather than preempting core programming with other material, simply to air such other material on a channel on which core programming is not scheduled. Alternatively, Children Now proposes that core programming be shifted to another channel when it is preempted by other material, but that it still be shown at the same time as originally scheduled, and that datacasting be provided on the “preempted” channel, informing viewers of where they might locate their preempted program. Children Now believes that such a requirement is both reasonable and feasible in light of broadcasters’ ability to “multicast” in the digital age, thus utilizing multiple channels at the same time. The one exception which Children Now would allow to the foregoing preemption rules would be for “breaking news,” with such news defined narrowly to include only that news of such a nature as to necessitate its being broadcast on every channel.

*Children Now discusses this proposal in section II(F) of its comments, and in that section responds to questions raised by the Commission in ¶ 28 of the NPRM.*

- **SEPARATION OF INTERACTIVE ADVERTISING CONTENT FROM INTERACTIVE PROGRAMMING CONTENT:**

Children Now proposes that any advertisements featured in interactive programming be separated clearly from programming material. This would be achieved by placing all advertisements on a secondary site which viewers can access only by engaging a link within the primary, or main programming site. Similarly, any internet or other material which is linked to a program for its non-advertising content, but which also happens to feature advertisements or links to advertisements, must be accessible only from within a larger site, rather than being accessible directly from the television screen. Furthermore, such material could be accessed only when a specific link to that material is engaged, and only after the viewer is warned that they will be entering an outside site on which advertising is or may be featured. Through this proposal, Children Now seeks to strike a balance between protecting children in a manner analogous to that by which current advertising restrictions protect children, while at the same time recognizing that educational interactive links would be highly unlikely to flourish were the economic incentive provided by advertisements entirely denied broadcasters.

*Children Now discusses this proposal in section III(B) of its comments, and in that section responds to questions raised by the Commission in ¶ 32 of the NPRM.*

- **IMPORTING COPPA REQUIREMENTS INTO THE DIGITAL AGE:**

Finally, Children Now proposes that the protections which the Children's Online Privacy Protection Act ("COPPA") brings to internet websites be imported into the digital interactivity context. Thus, advertisers featured on digital interactive sites could not engage in any of the intrusive practices prohibited under COPPA.

*Children Now discusses this proposal in section III(C) of its comments, and in that section responds to questions raised by the Commission in ¶ 32 of the NPRM.*

## **I. Introduction**

Children Now, in association with the national coalition People for Better TV, hereby submits the following comments in response to the *Notice of Proposed Rulemaking* (hereinafter, “*NPRM*”) in the above-captioned proceeding that was released on October 5, 2000. Children Now commends the Commission for its careful efforts to determine how best to facilitate an environment in which children’s programming will flourish in the digital age. In particular, Children Now commends the Commission for recognizing that all educational and informational programming requirements and advertising restrictions of the Children’s Television Act of 1990 (hereinafter, “*CTA*”) are fully applicable to digital broadcasters,<sup>1</sup> and for seeking in this rulemaking to determine how best to import those existing mandates into the digital age, as well as how best to harness the new opportunities presented by the digital age to serve our nation’s children.

These comments begin by outlining, in section II, Children Now’s underlying philosophy with respect to educational and informational programming in the digital age. Section II then goes on to detail Children Now’s specific proposals with respect to such programming, emphasizing the importance of striking a balance between unambiguous minimum programming requirements and the provision of room for flexibility and innovation by broadcasters. In section III, Children Now details our proposals with respect to advertising in the digital age, emphasizing the importance of protecting children while at the same time acknowledging the potential utility of economic incentives for the creation of educational and informational programming. Our comments conclude in section IV, in which we encourage the Commission to continue to inquire into the matters discussed herein as the digital era unfolds.

These comments benefit tremendously from a series of interviews conducted by Children Now. This series includes interviews with leading academics and advocates regarding their opinions on educational and informational programming, and on advertising during children's programming in the digital age. Children Now spoke with these experts regarding their general opinions on these topics, as well as their detailed views on specific proposals for importing existing requirements into the digital age, and for facilitating a safe and robust educational programming environment for children in the digital age.<sup>2</sup>

## **II. Children's Educational and Informational Programming in the Digital Age: Seizing New Opportunities**

Digital television holds the key to revolutionary change in the very nature of the television viewing experience. As the Commission observed in the *NPRM* and as Children Now discussed in its comments responding to the Commission's Notice of Inquiry of December 20, 1999 (hereinafter, *NOI comments*), digital television affords broadcasters the opportunity to enhance greatly picture and sound quality, to "multicast" by utilizing digital spectrum to broadcast several channels simultaneously, and to transmit a virtually limitless variety of information over digital channels, including

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<sup>1</sup> See *NPRM* at ¶ 12.

<sup>2</sup> Children Now conducted audiotaped telephone interviews with the following experts: Dr. Gordon Berry (School of Education, University of California, Los Angeles), Ms. Peggy Charren (Founder, Action for Children's Television), Dr. Sandra L. Calvert (Department of Psychology, Georgetown University), Dean Geoffrey Cowan (Annenberg School for Communications, University of Southern California), Dean Aimee Dorr (School of Education, University of California, Los Angeles), Dr. George Gerbner (School of Communications and Theater, Temple University), Dr. Katharine Heintz-Knowles (children's media consultant), Ms. Karen Jaffe (executive director, KIDSNET), Dr. Amy Jordan (Annenberg Public Policy Center, University of Pennsylvania), Mr. David Kleeman (executive director, American Center for Children and Media), Dr. Dale Kunkel (Department of Communications, University of California, Santa Barbara), Dr. Donald Roberts (Department of Communications, Stanford University), Dr. Brian Smith (Media Laboratory, Massachusetts Institute of Technology), Dr. Joseph Turow (Annenberg School for Communications, University of Pennsylvania), and Dean Ellen Wartella (College of Communication, University of Texas). Dr. Kunkel also participated in an untaped follow-up telephone conversation.



interactive educational material.<sup>3</sup> In the case of children's television, this presents previously unimagined opportunities to create and to broadcast educational programming that is more dynamic, pedagogically effective, and attractive to children, and to offer parents and children a greater number and wider variety of programs from which to choose.

Yet with these historic opportunities come equally significant challenges. First, there is the challenge to translate existing policies, which help to facilitate children's cognitive, social and emotional development, into equivalent policies appropriate to the digital context. Second, there is the challenge to protect children from potential abuses of the new technology, whether through invasive and manipulative advertising techniques, privacy violations, or other practices. Finally, and perhaps most significantly, there is the challenge to seize the historic opportunity which digital television presents, by determining how most effectively to harness its potential to improve children's lives.

In this section of our comments, Children Now addresses those questions posed by the Commission in the *NPRM* with respect both to importing existing core programming requirements into the digital age, and to harnessing digital television's increased qualitative and quantitative capacity to improve children's programming. We begin with a subsection summarizing our overall approach to these matters, and then proceed more thoroughly to detail that approach in the remaining subsections.

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<sup>3</sup> See *NOI comments* at 8-19; *NPRM* at ¶ 10. See also, e.g., Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, *Charting the Digital Broadcasting Future: Final Report of the Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters* at ¶ 1, *What is Digital Television?* (1998); Robert X. Cringely, Public Broadcasting Service, *Digital TV: A Cringely Crash Course* (last visited November 25, 2000), <http://www.pbs.org/opb/crashcourse> [hereinafter Cringely & PBS]; People for Better TV, *Here Comes Digital TV*, (last visited November 7, 2000), <http://www.bettertv.org/digital/html>.

## **A. Summary of Approach to Educational and Informational Programming in the Digital Age**

Underscoring Children Now's approach to educational and informational programming in the digital age is the conviction that digital television's full potential to improve such programming can be realized only through cooperation between the public and private sectors. On the one hand, continued regulation is necessary to ensure a baseline commitment to children's educational programming. Furthermore, some degree of regulation not only is necessary but is desirable to make clear that broadcasters owe significant service to the public in exchange for broadcasters' continued receipt of so valuable and public a commodity as broadcast spectrum.<sup>4</sup> On the other hand, Children Now believes that no regulatory model likely will lead to high quality educational programming absent genuine motivation by broadcasters to produce such programming, and that any model therefore must give broadcasters "breathing room" to make children's programming not only more innovative, dynamic, and educational, but also more desirable to program.

In this respect, Children Now is cautiously optimistic about digital television's potential to heighten incentives for broadcasters to program quality educational programming for children, while mindful of hard-learned lessons regarding the necessity of unambiguous minimum programming requirements. With regard to the latter, Congress made clear in enacting the CTA its conclusion that "[m]arket forces ha[d] not

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<sup>4</sup> See *infra* notes 14-16 and accompanying text. Additionally, several experts made a point of stressing the importance that spectrum be utilized in the public interest, in light of broadcasters' valuable receipt of the same. *E.g.*, telephone interview with Dr. Sandra L. Calvert, Department of Psychology, Georgetown University (Nov. 8, 2000) [hereinafter Calvert interview]; telephone interview with Dr. George Gerbner, School of Communications and Theater, Temple University (Nov. 16, 2000) [hereinafter Gerbner interview]; telephone interview with Dr. Dale Kunkel, Department of Communications, University of California, Santa Barbara (Nov. 10, 2000) (first of two telephone interviews with Professor Kunkel)

worked” to ensure an adequate, minimum amount of “programming specifically designed to serve the informational and educational needs of children.”<sup>5</sup> Seven years later, the Commission determined that there had been no significant increase in such programming since passage of the CTA and that an unambiguous minimum programming requirement was necessary for Congressional intent to be realized, thus leading to the current three hour rule.<sup>6</sup> While the digital era may create new incentives to broadcast children’s educational programming, as increased quantitative capacity enables broadcasters to broadcast to many different demographic groups at one time,<sup>7</sup> and as potential qualitative advancements may make children’s programming more attractive to children and to parents alike, unambiguous minimum programming requirements remain crucial. Indeed, such requirements not only ensure a baseline level of service to the extent that market incentives do not sufficiently fulfill broadcasters’ public interest obligations,<sup>8</sup> but also help to steer market forces in a direction which facilitates the fulfillment of such obligations. In other words, regulatory requirements can jumpstart progress in those cases where market incentives to increase and improve children’s educational

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[hereinafter first Kunkel interview]; telephone interview with Dean Ellen Wartella, College of Communication, University of Texas (Nov. 10, 2000) [hereinafter Wartella interview].

<sup>5</sup> S. Rep. No. 227, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 9, 16 (1989) (hereinafter “Senate Report”).

<sup>6</sup> In the Matter of Policies and Rules Concerning Children’s Television Programming: Revision of Programming Policies for Television Broadcast Stations, MM Docket No. 93-48, *Report and Order*, 11 FCC Rcd 10660, ¶¶ 2, 5, 36, 44, 120-121 (1996) [Hereinafter *1996 Report and Order*]. For a more detailed history of the CTA and the three hour rule, see *NOI comments* at 20-25.

<sup>7</sup> Broadcasters may find, for example, that they need no longer choose between targeting an adult audience, a “general” children’s audience, or a children’s audience falling within a specific age range for a given time slot. Indeed, broadcasters may even find it increasingly advantageous to appeal to smaller niche groups as the possibilities for marketing to more general audiences become exhausted. *E.g.*, Calvert interview (noting that, with enhanced channel capacity, it might become relatively more profitable for broadcasters to appeal to smaller demographic groups).

<sup>8</sup> Aside from the obvious possibility that market incentives will not increase at all, it also is possible that they will increase incrementally, but not to a level sufficient to buck historical trends and eviscerate the need for clear regulations.

programming have not yet been recognized, or can “fill the incentive gap” where such incentives are apparent but are somewhat outweighed by opportunity costs.

Children Now’s proposal thus seeks to strike a balance between ensuring the existence of unambiguous minimum programming requirements, and allowing broadcasters sufficient flexibility to innovate, and to discover common ground between their own interests and those of children. The proposal is designed to meet that challenge in three primary ways: (1) By quantifying core programming obligations unambiguously, while allowing broadcasters great flexibility in determining how, when and where on the digital spectrum to provide core programming; (2) By requiring a minimum level of technical quality in children’s programming, while tailoring that requirement to fit individual broadcasters’ technical capacity and programming decisions; and (3) By increasing parents’ and children’s access to programming information, thus enabling them to make better informed choices. Children Now elaborates on these elements of its proposal in the remainder of this section.

## **B. Minimum Programming Requirements: The Proportional Rule**

In our *NOI comments*, Children Now proposed that each broadcaster provide an amount of weekly core programming proportional to the three hours per week requirement currently administered under the CTA.<sup>9</sup> Specifically, Children Now pointed

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<sup>9</sup> The Commission requested comments on whether the proportional rule should apply equally to free or to pay programming, and to video as well as datacasting or other non-video programming. See *NPRM* at ¶ 19. With regard to the former, Children Now believes that, while all core programming must be free and therefore available to all children with television service, the number of “overall programming” hours to be counted in calculating each broadcaster’s 3% obligation should include subscription and any other “pay” programming, as well as all free programming. This system is appropriate and fair, as broadcasters receive their digital spectrum on the same terms, regardless of whether they ultimately choose to use it for “free” or for “pay” purposes. That a broadcaster may decide that it is in their financial interest to use some spectrum for subscription services should in no way diminish their core programming obligations. Nor should the

out that broadcasters currently are required to air three hours per week of core programming within an overall programming week of 105 hours,<sup>10</sup> translating to a core requirement of roughly 3% of programming. Children Now thus proposed that the three hour rule simply become the “3% rule,” or “proportional rule” in the digital age.<sup>11</sup> The reason for the proposed transition from a rule based upon raw numbers to an equivalent, percentage-based rule is two-fold. First, because programming schedules likely will exceed 105 hours per week in the digital age due to broadcasters’ “multicasting” ability, a new quantification method is required to ensure that benefits equivalent to those intended by the three hour rule will reach children. Second, because these new programming quantities likely will vary among broadcasters, depending upon the degree to which each utilizes “multicasting,” a flexible, percentage based rule is far more desirable than a rigid rule based upon raw numbers.<sup>12</sup> We continue to support the proportional rule, or 3% rule, as a fair and simple means of quantifying broadcasters’ core programming obligations in the digital age.<sup>13</sup>

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fact that broadcasters must pay a percentage of subscription service revenues to the Commission diminish their core programming obligations, as this revenue percentage amounts simply to a cost that broadcasters must factor into their decision to utilize spectrum for free or for subscription services. See 47 U.S.C. § 336(e)(1); *Fees for Ancillary or Supplementary Use of Digital Television Spectrum*, 65 Fed. Reg. 6544, 6545 (2000). With respect to the Commission’s question regarding the application of the proportional rule to video versus non-video programming, we explain in subsection II(C)(1) and in accompanying footnote 31 our proposals for fashioning proportional requirements in the context of interactivity coupled with video programming, and in the context of interactive or datacasting services aired in their own right.

<sup>10</sup> The 105 hour figure is premised upon the current figure of 15 programmable hours per day during the daily E/I programming window (7 a.m. to 10 p.m.), resulting in 105 weekly programmable hours, during which time three of those hours must take the form of core programming. *NOI comments* at 35.

<sup>11</sup> See *NOI comments* at 35 & Appendix A.

<sup>12</sup> *NOI comments* at 34-35.

<sup>13</sup> Furthermore, numerous experts mentioned their support for the proportional rule as a fair and effective means of quantifying minimum core programming obligations. Telephone Interview with Ms. Karen Jaffe, executive director, KIDSNET (Nov. 6, 2000) [hereinafter Jaffe interview]; telephone interview with Mr. David Kleeman, executive director, American Center for Children and Media (Nov. 8, 2000) [hereinafter Kleeman interview]; telephone interview with Dr. Joseph Turow, Annenberg School for Communication, University of Pennsylvania (Nov. 16, 2000) [hereinafter Turow interview]; telephone interview with Dr. Aimee Dorr, School of Education, University of California, Los Angeles (Nov. 17, 2000) [hereinafter Dorr interview]; telephone interview with Dr. Donald Roberts, Department of

Indeed, the proportional rule constitutes the very heart of the set of proposals contained herein. Absent an unambiguous, minimum guarantee of core programming, the significance of measures to facilitate innovation in core programming, or to effectuate core programming requirements, of course is greatly diminished. Thus, Children Now emphasizes that it is particularly crucial that the Commission implement the proportional, or 3% rule, and that the utility of any supplemental requirements, incentives, or options is largely dependent upon the existence of an unambiguous minimum core programming guarantee. That the proportional rule is extremely flexible and thus works easily in conjunction with such supplemental requirements, incentives and options as proposed or otherwise suggested herein, makes clear its dual benefits of providing both a crucial minimum core programming guarantee, as well as flexibility to facilitate innovation in core programming.

At the outset, it is important to note that the policy origins of the proportional rule extend back further than the Commission's promulgation of the three-hour rule or Congress' statements of intent in promulgating the CTA. Rather, the notion that a broadcaster must utilize their spectrum in part to serve the public interest dates back at least as far as the 1927 establishment of the Commission's predecessor, the Federal Radio Commission, which was "established to allocate frequencies among competing applicants in a manner responsive to the public 'convenience, interest, or necessity.'"<sup>14</sup> It has long been acknowledged, in short, that some degree of service to the public interest is an entirely necessary, reasonable and constitutional price to pay for the receipt of a

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Communications, Stanford University (Nov. 16, 2000) [hereinafter Roberts interview]; telephone interview with Dr. Katharine Heintz-Knowles, children's media consultant (Nov. 13, 2000) [hereinafter Heintz-Knowles interview]; first Kunkel interview; Wartella interview.

commodity as valuable and as integrally linked to the public interest as broadcast spectrum.<sup>15</sup> That such service includes efforts directed toward children, our nation's most vulnerable population and one deeply influenced by television, is only logical, as is mandating a minimum children's programming requirement where less directive and specific measures have failed.<sup>16</sup>

Given this context, a proportional rule mandating that a mere 3% percent of all programming be core is simply reasonable. Indeed, Children Now believes that a heightened percentage requirement beyond 3% also would be reasonable in light of the context obligating broadcasters to serve the public interest, and we strongly encourage broadcasters to offer programming beyond the minimum requirement. Ultimately, however, Children Now requests only the imposition of a 3% requirement, in the spirit of striking a balance between regulatory certainty and precision on the one hand, and broadcaster flexibility on the other. The following two subsections discuss further these two characteristics of the proportional rule. The first subsection emphasizes the fair but precise nature of the rule, and the second subsection emphasizes the flexibility that the rule accords broadcasters in implementing it.<sup>17</sup>

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<sup>14</sup> *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 375-76 (1969) (quoting Radio Act of 1927, § 4, 44 Stat. 1163).

<sup>15</sup> See, e.g., *CBS v. Democratic National Committee*, 412 U.S. 94, 101-03, 116-17, 122 (1973). See also Senate Report at 10-18; H. Rep. No. 385, 101<sup>st</sup> Cong., 1<sup>st</sup> Sess. 8-12 (1989) [hereinafter "House Report"]; *1996 Report and Order*, 11 FCC Rcd 10660 at ¶¶ 14, 149-59.

<sup>16</sup> See, e.g., Senate Report at 10-18; House Report at 8-12; *1996 Report and Order*, 11 FCC Rcd 10660 at ¶¶ 2, 5, 14, 36, 44, 120-21, 149-59.

<sup>17</sup> The Commission requested comments on when the proportional rule, or any other requirements relevant to digital television, should become effective. *NPRM* at ¶ 16. Children Now believes that any affirmative requirements as to core programming or other features that broadcasters must make available should become effective as to each broadcaster when that broadcaster's programming becomes at least 50% digital. This would not unduly burden broadcasters, as core programming and any related requirements would be proportional to the amount of programming actually aired. Thus, to the extent that airing only 50% digital programming would reduce the number of overall hours broadcast, this would be reflected in core programming and related requirements. Children Now believes, however, that any advertising restrictions unique to digital television, such as COPPA requirements or advertising link restrictions, see

## **1. Fair and Unambiguous Quantification**

In unambiguously quantifying minimum programming requirements, the proportional rule ensures a basic commitment to our nation's children, to whom broadcasters owe a public service in exchange for their receipt and use of valuable spectrum.<sup>18</sup> The rule's clarity and precision provide an unambiguous guarantee that a set percentage of all programming will be educational and informational, and thus designed to serve the cognitive, social and emotional developmental needs of children.

At the same time, the proportional rule is fair to broadcasters, not only as it merely translates the existing three-hour requirement and hence existing broadcaster expectations into a percentage based framework, but also as it inherently tailors itself to each broadcaster's programming capacity and decisions.<sup>19</sup> Thus, those broadcasters with an abundance of programming hours will acquire a proportionally greater share of core programming responsibility, while those broadcasters who program fewer hours than their colleagues will acquire a proportionally smaller share of core programming responsibility. Our nation's children thus will reap the benefits of unambiguously quantifiable guarantees of service, at the same time as such quantification is calculated in a manner even-handedly tailored to broadcasters' individual circumstances.

Of course, children will be served by the rule's precision and clarity only to the extent that the rule is adhered to consistently. Thus, Children Now opposes any

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Section III, must become effective immediately upon the airing by a broadcaster of a digital program with the relevant features. For example, any commercial links offered at any time would have to conform with the restrictions outlined by Children Now in Sections III(B) and III(C) of the instant comments.

<sup>18</sup> See *supra* notes 14-16 and accompanying text.

<sup>19</sup> As evidenced by the instant comments, Children Now believes that a percentage based approach to quantifying core programming obligations is far more advantageous than a raw numbers based approach, such as the daily one hour requirement suggested by the President's Advisory Committee on the Public Interest Obligations of Digital Television Broadcasters. See *NPRM* at ¶ 23 (requesting comments on Advisory Committee proposal).



model which would allow broadcasters to program an amount of core programming which is less than 3% of overall programming in exchange for other services.<sup>20</sup> As noted above, 3% is an utterly reasonable amount of core programming to require when viewed in the context of broadcasters' valuable spectrum rights, and particularly of abundant new programming opportunities in the digital era. Given the small amount of core programming requested, then, it is entirely feasible and in fact necessary that the resulting obligation be a genuine *minimum* requirement, below which broadcasters' programming percentages may not fall.

Therefore, while Children Now largely supports any "menu" model to the extent that it would provide broadcasters flexibility in meeting the 3% core programming obligation,<sup>21</sup> Children Now opposes any such model to the extent that it would allow broadcasters to fall below a 3% core programming requirement in exchange for other services. Our analysis in this regard relates directly to the Commission's request for comments regarding the following possible ways of meeting the core programming requirement: (1) additional core programming beyond the current three hour requirement; (2) broadband or datacasting services to local schools, libraries or community centers; (3) support for the production of children's educational programming by noncommercial program producers; (4) the creation of specialized channels for children's programming; or (5) outreach efforts to create awareness of core programming.<sup>22</sup>

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<sup>20</sup> Ms. Jaffe also stressed the importance of not allowing for "trade off" options below the minimum core programming requirement. Jaffe interview.

<sup>21</sup> See *infra* Section II(B)(2) (discussing proportional rule's flexibility).

<sup>22</sup> *NPRM* at ¶ 21-22. The Commission's suggestions as to particular "menu" components are based in large part upon the Center for Media Education's (CME's) menu proposal in its own NOI comments [hereinafter *CME's NOI Comments*]. Specifically, CME suggested that, beyond the existing three hour rule, broadcasters be required to make additional efforts including one or more of the following: "air[ing] more educational and informational programming specifically designed for children; [p]rovid[ing] multi-casting and/or broadband/datacasting services to local schools, libraries, and community centers; or [s]upport[ing]

Of the aforementioned “menu” options, the first is entirely consistent with the 3% rule, insofar as the rule by definition requires programming beyond three hours per week, so long as broadcasters program more than 100 hours per week of programming. Similarly, the fourth option mentioned by the Commission is consistent with the 3% rule, as the rule would leave broadcasters free to distribute their core programming in virtually any manner that they choose, as detailed below in our discussion of the rule’s flexibility. And, as explained in our “pay or play” discussions at Section II(D) and Appendix A, while Children Now supports deferring any final ruling on “pay or play” until a later date, a “pay or play” system could quite easily exist in tandem with the proportional rule. Indeed, the “pay or play” model detailed in Appendix A would do just that, offering broadcasters an option to fill their 3% core programming obligation, rather than replacing or otherwise altering such obligation. Thus, a “pay or play” model could quite easily be incorporated into a proportional rule system, were such a model to be implemented through future rulemaking.

Children Now does not believe, however, that either the second or fifth options mentioned by the Commission, or any other non-core programming options, should be utilized to offset the 3% requirement. With respect to the possibility of offsetting programming requirements with outreach and promotions (the fifth option mentioned by the Commission), Children Now believes that outreach concerning core programming is crucial to make the core programming requirement meaningful and successful, and that it therefore should be a *supplement* to the requirement, as discussed

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funding for the production of children’s educational programming by local public broadcasting stations and other non-commercial, educational organizations.” *CME’s NOI Comments* at 5. Furthermore, in discussing its proposal that more core programming be provided, CME pointed out that broadcasters could choose to place core programming on specialized channels. *Id.* at 5-6.

below in section II(E). But to utilize outreach and promotional activity to offset the amount of programming being promoted would be counterproductive, and, again, would diminish a requirement already extremely generous to broadcasters.

With respect to the possibility of offsetting programming requirements with the provision of broadband or datacasting services to schools, libraries or community centers (the second option mentioned by the Commission), Children Now recognizes such service provision to be a worthy goal generally, but believes that the fundamental purpose of the instant rulemaking would be severely diluted were broadcasters to use such service to offset core programming obligations. Indeed, the Commission makes clear in the *NPRM* that the instant rulemaking centers fundamentally upon the question of how to protect children with respect to the *home* viewing experience in the digital age,<sup>23</sup> noting among other things the pervasive influence that leisure television viewing has upon children's lives.<sup>24</sup> To offset minimum programming guarantees with respect to the home viewing experience by enabling broadcasters to provide services to other entities in the community would severely diminish the protections which the instant rulemaking is designed to uphold.<sup>25</sup> Thus, while Children Now reiterates that such service provision is a worthy goal generally, Children Now strongly opposes any proposal which would

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<sup>23</sup> See, e.g., *NPRM* at ¶ 12 (stating that the purpose of the instant rulemaking is to determine how advertising limits and educational and informational programming requirements "should be interpreted and adapted with respect to digital broadcasting," and noting that the objectives of the CTA are to "increase the amount of educational and information[al] broadcast television programming available to children and to protect children from overcommercialization of programming") (emphasis added).

<sup>24</sup> *Id.* at ¶¶ 2-3.

<sup>25</sup> In addition to such service provision detracting from home viewing protections if offered as an "offset" option, Children Now is concerned as to how such an offset option would be administered. It is unclear, for example, how one would ensure that schools or other organizations actually utilize the services provided, or that they utilize them in an equitable manner. It is also unclear how schools or other organizations would be chosen to receive the relevant benefits, which could raise serious equity issues. While Children Now reiterates that the goal of such service provision is a worthy one, our concerns simply speak to the fact that such service provision should not be utilized to detract from, or in any way to offset, a minimum core programming requirement of 3% of overall programming.

offset a minimum requirement that at least 3% of all programming be core with such an option, or indeed, with any non-core programming option.<sup>26</sup>

While the proportional rule thus should not be offset by non-core programming options, Children Now supports according broadcasters vast flexibility in meeting the core programming obligation itself. This is in keeping with Children Now's deeply held conviction that a balance must be struck between unambiguous minimum programming requirements to ensure basic protections to child viewers, and flexibility for broadcasters in meeting those requirements. Such flexibility ideally will encourage innovation, and enable broadcasters to discover a nexus between their own interests and those of the children served by core programming requirements. We thus turn to our remaining discussion of the proportional rule, which explores the rule's flexibility.

## **2. Flexible Implementation**

The proportional rule model is free from constraints regarding where, when, and how broadcasters may choose to program educational and informational programming, so long as such programming meets current requirements of being regularly scheduled between the hours of 7a.m. and 10p.m., and at least half an hour in

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<sup>26</sup> By the same token, Children Now strongly urges the Commission not to carry into the digital age its current rule enabling broadcasters to offset their minimum core programming requirement with "a package of different types of educational and informational programming that, while containing somewhat less than [the minimum programming amount], demonstrates [an equally high] level of commitment to educating and informing children," or with "special nonbroadcast efforts . . ." 47 C.F.R. § 73.671, Note 2. For the reasons discussed throughout the instant comments, Children Now considers it crucial that any minimum programming obligation amount genuinely to a *minimum* obligation. Furthermore, the Commission has ample statutory authority to effectuate this change, as the language of the CTA states only that the Commission "may" consider nonbroadcast efforts in making licensing decisions, and certainly does not require the Commission to offset its minimum core programming obligations with such efforts. *See* 47 U.S.C. § 303(b)(1). *See also infra* Section (II)(C)(2)(b) & note 61 (explaining that statutory reference to "overall programming" does not prevent the Commission from setting an unambiguous minimum core programming requirement).

length per program.<sup>27</sup> Thus, Children Now fully supports allowing broadcasters the freedom to disperse educational and informational programming across their programming schedule and/or their various channels, or alternatively to place all such programming on a dedicated “children’s” channel, or on a channel so dedicated for part of the programming day or week.<sup>28</sup>

Furthermore, additional components of Children Now’s proposal work in tandem with the proportional rule to enhance broadcaster flexibility, and to encourage innovation and creativity by broadcasters. For example, as detailed in the subsection immediately following this one, Children Now proposes a “proportional interactivity rule,” significantly simplifying the more extensive technical quality proposal raised in Children Now’s *NOI comments*. As with the proportional rule for E/I programming generally, the proportional interactivity rule would simply quantify broadcasters’ core obligations with respect to airing programming of an interactive nature, but would leave broadcasters completely free to determine where, when and how to fit such programs into their overall core programming schedule. In contrast to the technical quality proposal proffered in our *NOI comments*, the proportional interactivity rule would not require broadcasters to quantify the precise technical quality of their non-core programming, but rather would concern itself solely with ensuring that children receive the educational

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<sup>27</sup> 47 C.F.R. § 73.671(c)(2) - (4). And of course, all core programming must indeed be “educational and informational.” *See id.* at (c)(1), (5) – (6).

<sup>28</sup> This, of course, speaks directly to the Commission’s inquiries concerning allowing broadcasters to place all of their core programming on “specialized channels.” *See NPRM* at ¶ 21. It also speaks directly to the Commission’s questions regarding whether a proportional rule would apply separately to each programming stream, or to a broadcaster’s overall programming. *See NPRM* at ¶ 19. As articulated herein, the proportional rule would calculate programming requirements based upon a broadcaster’s overall programming, but would allow broadcasters to distribute their required core programming in any manner that they wish, so long as they comply with all core programming obligations. Finally, this aspect of Children Now’s proposal is consistent with CME’s suggestion that broadcasters be allowed to place their core programming on specialized channels. *CME’s NOI Comments* at 5-6.

benefits of *interactive* programming in an amount proportional to the use of interactivity in non-core programming. We now turn to a more detailed discussion of the proportional interactivity rule.

### **C. Dispersal of Technical Benefits: Proportional Interactivity Rule & Incentives for Educational Interactivity in Overall Programming**

#### **1. Interactivity Rule**

In this subsection, Children Now simplifies our earlier proposal regarding ensuring technical quality in core programming, to focus only upon those technological advances most significant for children's development. In our *NOI comments*, Children Now proposed making all aspects of channel technical quality in non-core programming proportional to channel technical quality in core programming. Under that proposal, any aspect of channel quality utilized in non-core programming would have had to be utilized in an equal percentage of core programming. Thus, if 20% of all non-core programming were broadcast in high definition, then 20% of all core programming would have had to be broadcast in high definition.<sup>29</sup> Upon further consultation with experts and the holding of three focus groups, however, Children Now has determined that what is significant is ensuring that the benefits of *interactive* technology reach children in an educational context, and that it is most beneficial to children to focus upon this aspect of digital technology in requiring technical parity. Therefore, Children Now streamlines our proposal, proposing simply that the same percentage of core programming include an interactive component as does non-core programming.<sup>30</sup> In other words, for all non-core

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<sup>29</sup> See *NOI comments* at 35-36.

<sup>30</sup> Calculation of the necessary amount of interactive core programming could be achieved with relative ease. Broadcasters would be required simply to determine the amount of core programming which

programming that regularly features an interactive component, the same percentage of core programming should also feature such components.<sup>31</sup> An “interactive component” is any technical feature which enables a viewer to interact with the screen and receive feedback, including, for example, links that a viewer could engage to download and receive Internet or other content, or “buttons,” logos or other on-screen items that a viewer could engage to receive more onscreen features or information, to enter “chatrooms” with other viewers, or to engage in interactive activities such as game-playing, question-and-answer sessions, etc. Furthermore, because a fundamental purpose of the proportional interactivity rule is to enhance the educational experience for the child viewer, broadcasters would be required to explain, in the same Commission reports in which they explain why their core programming qualifies as “educational and

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regularly features interactive components. Children Now proposes defining “regularly features” as meaning that a given program features interactive components in at least 25% of all episodes in a given year. The calculation as to each year’s requirements could be made based either upon the previous year’s programming, or, where necessary to ensure that no significant discrepancies occur, upon an estimate of upcoming programming. (The latter method might be necessary during the first few years of full digital programming, should the use of interactive components increase substantially each year).

<sup>31</sup> Children Now’s proposed proportional interactivity rule relates both to the Commission’s request for general commentary on how “the advanced capabilities of digital broadcasting can be used . . . to help implement the CTA”, *NPRM* at ¶ 24, and to the Commission’s request for comments on whether a proportional rule should apply to ancillary services such as datacasting. *NPRM* at ¶ 19. The Commission has noted that “[a]ncillary and supplementary services could include, but are not limited to, subscription television programming, computer software distribution, data transmission, teletext, interactive services, audio signals, and any other service that do not interfere with the required free service.” In the Matter of Advanced Television Systems and their Impact Upon the Existing Television Broadcast Service, *Fifth Report & Order*, 12 FCC Rcd 12809, at ¶ 29 (1997). Because Children Now does not anticipate that a significant amount of channel space will be dedicated to datacasting or interactivity not featured in conjunction with video programming, Children Now focuses primarily in this subsection not upon treating features such as datacasting and interactivity as separate items to be quantified separately, but rather in terms of their connection with video programming. Nonetheless, where channel space is dedicated to the independent use of such features, unconnected with any video programming, Children Now supports making 3% of any such usage core. Thus, a 3% rule would apply to video programming, and the resulting amount of core programming would include interactive components in an amount proportional to the use of such components in non-core programming, and a separate 3% requirement would exist for any datacasting or interactive services transmitted independent of video programming. The latter would act primarily as a safeguard in the case that a significant amount of channel space is dedicated *solely* to datacasting or similar services.

informational,” why any interactive components used to satisfy the interactivity requirement themselves are “educational and informational.”<sup>32</sup>

Several of the experts with whom Children Now spoke in preparing these comments opined on the importance of interactive technology reaching children in the context of core programming, both for its potential educational benefits, and also to protect against core programming’s being seen by children as significantly less attractive than other, more technologically advanced programming.<sup>33</sup> Significantly, children share a similar view as to what is in the interests of their pedagogical development. Indeed, most respondents in each of three focus groups conducted by Children Now, spanning ages 7 - 18,<sup>34</sup> considered educational links in core programming to be “useful”.<sup>35</sup>

Indeed, the educational possibilities of such interactivity are virtually limitless, offering broadcasters the opportunity to provide children with everything from critical thinking questions related to a program, to links offering more information about issues raised in a program, to games testing their comprehension of a program. A popular format for a programming link, for example, might well look very similar to

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<sup>32</sup> See 47 C.F.R. §§ 73.671(c)(5), 73.3526(e)(11)(iii).

<sup>33</sup> See *infra* note 42 (discussing the likelihood of interactive features proving highly attractive to children). See also Kleeman interview (noting benefits of interactivity as programming that “makes kids want to get up and do something, or go do something when the TV gets turned off, or at least think about something”); telephone interview with Dr. Brian Smith, Media Laboratory, Massachusetts Institute of Technology (Nov. 13, 2000) (speaking generally to greater desirability of emphasizing programming interactivity as opposed to such technological features as high definition capacity); Heintz-Knowles interview (noting generally the desirability of interactive educational features); telephone interview with Dr. Gordon Berry, School of Education, University of California, Los Angeles (Nov. 14, 2000) (referring to educational potential of interactivity as well as its likely popularity with children).

<sup>34</sup> See Appendix D at 3-4, discussing the demographic breakdown of the three focus groups, and noting in particular that the groups included one group of 7 – 11 year olds, one group of 12 – 15 year olds, and one group of 15 – 18 year olds. As further discussed in Appendix D at 3-4, Children Now included in the latter group children beyond the maximum age to which core programming is targeted (16), given not only the contribution that seventeen and eighteen year olds can make generally in reflecting on their recent viewing experiences and those of younger siblings, but also given the special knowledge and expertise that the particular children in the latter group had to offer with respect to interactivity.

<sup>35</sup> See Appendix D at 5, 9.



existing television program “web pages,” featuring a variety of educational and entertaining possibilities for children to explore.

Another particularly exciting benefit of such interactivity is its potential to affect the digital divide, which at the same time would benefit broadcasters by attracting an audience of children not previously exposed to interactivity due to limited or nonexistent computer and Internet access. As Children Now pointed out in our *NOI comments*, the fact that digital television can broadcast interactive content without high-speed Internet connectivity, combined with the fact that most Americans have a television set but do not have Internet connectivity at home, suggests that digital television can be instrumental in introducing countless Americans to interactive technology.<sup>36</sup> While, as also pointed out in our *NOI comments*, the digital divide will not be affected absent financial access to digital television, basic levels of such service are likely to be accessed to the extent that all or most television programming becomes digital, assuming that current television owners choose not to forego basic television services as they currently forego the Internet.<sup>37</sup> This is another significant advantage to proportionalizing interactivity in lieu of other technical features of digital programming, as not all digital television owners will have access to such deluxe features as high definition television, whereas all viewers likely will have access to basic levels of interactive service.<sup>38</sup>

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<sup>36</sup> *NOI comments* at 17. See also *infra* note 38.

<sup>37</sup> *Id.* at 17-18.

<sup>38</sup> While viewers may not have access to the Internet from television links absent separate Internet service or a more advanced digital television set, for example, all viewers will have access to any interactive data transmitted and receivable directly from a viewer's digital television equipment. See, e.g., Cringeley & PBS, *supra*, at § *The Experiments*; Digital Television: The Site, at § *What is Digital Television?* *Consumer Information Page* (last visited Nov. 25, 2000) <http://www.digitaltelevision.com/what.shtml>; Andy Carvin, Corporation for Public Broadcasting, *Digital Television: A New Tool for Education?* (Oct. 30, 1998) (last visited December 10, 2000) <http://edweb.gsn.org/teled98/speech.html>. In light of digital divide concerns,